# Foxwoods Resort Casino and International Union, UAW, AFL-CIO, Petitioner and State of Connecticut, Intervenor. Case 34–RC-2230

June 30, 2008

# DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

The National Labor Relations Board has considered objections to an election held November 24, 2007, and the administrative law judge's report concerning disposition of them.<sup>1</sup> The election was conducted pursuant to a Decision and Direction of Election. The tally of ballots shows 1289 for and 852 against the Union, with 36 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the judge's findings and recommendations as modified below, and finds that a certification of representative should be issued.

1. We agree with the judge's recommendation to overrule the Employer's Objections 2, 3, and 5, concerning translation of the notice of election and ballots. See, e.g., *Bally's Atlantic City*, 352 NLRB 316, 321–322, 326–327 (2008) (Regional Office's refusal to translate the election notice did not warrant setting aside the election; the judge observed, inter alia, that employees were required to speak English on the job, that documents such as job applications and employee handbooks were issued in English only, and that the employer provided translated

explanations of the election process during its preelection employee meetings).<sup>4</sup>

2. We also agree with the judge's recommendation to overrule the Employer's Objection 6, which alleges that agents of the Union engaged in objectionable list keeping on election day. See, e.g., *Piggly-Wiggly #011*, 168 NLRB 792 (1967) (election set aside where union representatives stood in front of the polling place with a list of eligible employees and checked off employees' names as they entered). The Employer relies on the conduct of unit employee Mary Johnson, a member of the Union's employee organizing committee. The Employer argues that Johnson was an agent of the Union under the doctrine of apparent authority.<sup>5</sup>

In Corner Furniture Discount Center, 339 NLRB 1122, 1122 (2003), the Board stated:

Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe the principal has authorized the alleged agent to perform the acts in question. Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that his conduct is likely to create such a belief.

Employee members of an in-plant organizing committee are not, per se, agents of the union. See *Cornell Forge Co.*, 339 NLRB 733 (2003); *Advance Products Corp.*, 304 NLRB 436 (1991).<sup>6</sup> Indeed, the Board has found activities such as distributing literature, soliciting signatures on authorization cards, and talking to fellow employees about the union insufficient to make employees general agents of the union.<sup>7</sup>

The burden of proving agency is on the party asserting it. *Millard Processing Services*, 304 NLRB 770, 771 (1991), enfd. 2 F.3d 258 (8th Cir. 1993), cert. denied 510 U.S. 1092 (1994). Here, assuming arguendo that Johnson engaged in objectionable list keeping, the Employer failed to prove that her conduct was attributable to the Union.

<sup>&</sup>lt;sup>1</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

<sup>&</sup>lt;sup>2</sup> The judge was sitting as a hearing officer in this representation proceeding. The Employer has implicitly excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings.

We correct the following inadvertent errors by the judge, which do not affect our decision. Two employee witnesses named Yin Chen testified. Mr. Yin Chen, not Ms. Yin Chen, testified that he saw election notices posted in the casino in English and Chinese. Employee Barry Shuen, not Yin Chen, testified that he could read traditional and simplified Chinese and knew that "UAW" meant the Union. Finally, employee Ya Qiong Zeng did not testify that she saw the election notices at the casino.

In the absence of exceptions, we adopt pro forma the judge's recommendations to overrule Objections 7–12.

<sup>&</sup>lt;sup>4</sup> We do not rely on the statements in *NLRB v. Precise Castings*, 915 F.2d 1160, 1161–1162 (7th Cir. 1990), cert. denied 499 U.S. 959 (1991), quoted by the judge in the present case, that the Board no longer requires "laboratory conditions" or "meticulous safeguards" for elections. Rather, we find that the Employer failed to show that laboratory conditions were compromised.

<sup>&</sup>lt;sup>5</sup> The Employer does not contend that Johnson's conduct would warrant setting aside the election if she were not a union agent.

<sup>&</sup>lt;sup>6</sup> Chairman Schaumber concurred in *Corner Furniture*, supra, and *Cornell Forge*, supra, and he adheres to his positions in those cases.

<sup>&</sup>lt;sup>7</sup> See, e.g., Corner Furniture, supra at 1123; Advance Products Corp., supra at 436.

The employee organizing committee was a group of about 105 employees who spoke to coworkers about the Union, distributed literature, and met with union representatives to discuss working conditions and issues and to help identify coworkers who might be prounion. Any employee who wanted to call herself a member of the committee could do so.

The evidence does not show that the committee members were the Union's primary conduits of communication to employees or that union representatives were generally absent from the campaign. See, e.g., Corner Furniture, supra at 1123 (noting that the employee in question was not the union's only conduit to employees; emphasizing the active role played by the union's paid representative). Rather, the Union maintained a substantial presence throughout the campaign, beginning the campaign with a staff of 10 to 15 organizers and increasing that number to about 50 by the week of the election. Employee organizing committee members did not conduct the Union's meetings; members attended home visits only in the presence of a union staff member. The Union occasionally asked committee members to "tell their stories" to the press about why they wanted union representation, and the Union's media specialist worked with employees on how to present their stories, but there is no evidence that those stories were presented as anything other than employees' personal views.

With respect to employee Johnson specifically, although other witnesses testified that she appeared in a union campaign video, the video itself was not introduced in evidence, nor does the record contain any testimony about Johnson's role in it. Similarly, the record contains a paucity of detail regarding Johnson's level of participation in other organizing committee activities. The evidence does not show that the Union held out Johnson as its spokesperson or, in particular, that the Union condoned or was even aware of Johnson's alleged list keeping.

In these circumstances, we find that the Employer failed to prove that Johnson had apparent authority to engage in the alleged list keeping. We therefore overrule Objection 6.

#### CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for International Union, UAW, AFL—CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time licensed dealers employed by the Employer at its Connecticut Casino, including poker dealers, table game dealers, and dual rate dealers; but excluding all other employees, office cleri-

cal employees, and guards, professional employees, and supervisors as defined in the Act.

William E. O'Connor, Esq. and Terri Craig, Esq., for the Regional Director.

Richard B. Hankins, Esq., Alston Correll, Esq., Keith M. Harper, Esq., and Betsy Conway, Esq., for the Employer. Thomas W. Meiklejohn, Esq. and Elizabeth A. Conklin, Esq., for the Union.

#### DECISION ON OBJECTIONS

### STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in Hartford, Connecticut, in January 15, 16, 17, 23, 24, 28, and 29, 2008.

The petition in this case was filed by the Union on September 28, 2007. Pursuant to a Decision and Direction of Election issued on October 24, 2007, an election was conducted on November 24, 2007. Of approximately 2629 eligible voters, 1289 voted for the Petitioner, 852 voted against union representation, and 36 ballots were challenged. (About 472 people did not vote.) As the challenges were insufficient to affect the results of the election, a majority of the valid votes counted were in favor of the Union. The bargaining/voting unit is:

All full-time and regular part-time licensed dealers employed by the Employer at its Connecticut Casino, including poker dealers, table game dealers, and dual rate dealers; but excluding all other employees, office clerical employees, and guards, professional employees and supervisors as defined in the Act.

On December 3, 2007, the Employer filed objections to the election and on December 21, 2007, the Regional Director issued a supplemental decision on objections and notice of hearing. On January 16, 2008, the Board issued an Order rejecting the Employer's appeal of those objections that had been overruled by the Regional Director. In pertinent part, the Regional Director overruled Objections 1 and 4 and sent the remaining objections to a hearing.

The remaining objections are as follows:

<sup>&</sup>lt;sup>1</sup> It is noted that the Employer contended in the underlying representation case hearing that the Board does not have jurisdiction over the Mashantucket Pequot Tribe or its wholly owned gaming enterprise. The Regional Director concluded that the Board properly exercised jurisdiction in this matter pursuant to the Board's decision in *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004), enfd. 475 F.3d 1306 (D.C. Cir. 2007). As noted, the Board rejected the Employer's exceptions to the Regional Director's Decision and Direction and Election. The jurisdictional issue is therefore not before me.

<sup>&</sup>lt;sup>2</sup> Objection 1 simply reasserted the Employer's contention that the Board lacks jurisdiction in this matter. Objection 4 asserted that because the Petitioner was identified on the ballot only as "UAW" this did not comport with the Representation Casehandling Manual because the ballot failed to list the Petitioner's full name. The Regional Director concluded that there was no evidence to suggest that the voters were confused as to the identity of the Petitioner and he therefore overruled this objection.

Objection 2

The Employer alleges that ballots were available only in English despite the fact that numerous employees spoke other languages.

Objection 3

The Employer alleges that the Board's official notices were available only in English and traditional Chinese.

Obiection 5

The Employer alleges that the wording on the translated official notice did not comply with Board policy and procedure.

Objection 6

The Employer alleges that agents of the petitioner interfered with the election by making it known that they were keeping lists of the names and badge numbers of eligible voters, whether they voted and how they voted.

Objection 7

The Employer alleges that Petitioner's agents interfered with the election by making an election speech to a massed assembly of employees within 24 hours before the scheduled time for the election.

Objection 8

The Employer alleges that the Petitioner's agents interfered with the election by engaging in a pattern of harassment, threats and intimidations for the purpose of suppressing voter turnout of those who opposed unionization.

Objection 9

The Employer alleges that the Petitioner's agents interfered with the election by threatening eligible voters that the Union would obtain the discharge of employees who did not vote for or support the Union.

Objection 10

The Employer alleges that the Petitioner's agents interfered with the election by harassing and ridiculing eligible voters who did not support unionization.

Objection 11

The Employer alleges that the Petitioner's agents interfered with the election by threats of bodily harm to employees who expressed opposition to the Union.

Objection 12

The Employer alleges that by the above and other acts the Petitioner has engaged in conduct warranting the setting aside of the election.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following<sup>3</sup>

# FINDINGS AND CONCLUSIONS

#### I. GENERAL PRINCIPLES

In this proceeding, it is the Employer that has the burden of proof with respect to: (a) showing that certain specific conduct by union agents, or in some cases, other persons, had an undue and adverse impact on the election and (b) that the conduct occurred within the time period from the date that the petition

was filed until the date that the election was held. *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961).

Further, to balance the interests of insuring that employees have a fair chance to express their choice with the requirement that elections have at least a reasonable degree of finality, the Board has explicated a set of standards by which to judge whether conduct by either party will be sufficient to set aside an election. In *Taylor Wharton Harsco Corp.*, 336 NLRB 157, 158 (2001), the Board stated:

[T]he proper test for evaluating conduct of a party is an objective one- whether it has "tendency to interfere with the employees' freedom of choice." Cambridge Tool Mfg., 316 NLRB 716 (1995). In determining whether a party's misconduct has the tendency to interfere with employees' freedom of choice, the Board considers: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit: (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. See, e.g., Avis Rent-a-Car, 280 NLRB 580, 581 (1986).

As some of the conduct was allegedly done by prounion employees, there is an issue as to whether those persons should be construed as agents so that their conduct may legally be attributable to the Union. Ordinarily, employees, whether supporters of a union or supporters of an employer, are not considered to be agents of either party. Indeed, if we were to hold that either an employer or a union is liable for all the acts of their employee supporters, there would be less likelihood that we would ever get to a final result in many elections.

Generally, the Board applies the common-law principles of Agency including principles of apparent and actual authority in determining responsibility for misconduct. *Fieldcrest Cannon, Inc.*, 318 NLRB 470 (1995). See also *Culinary Foods, Inc.*, 325 NLRB 664 (1998).

I note, however, that there can be certain very limited situations where the actions of third parties (including employees) may be sufficient to set aside an election. But in those situations the proven conduct has to be so serious as to make a fair election impossible. *Westwood Horizons Hotel*, 270 NLRB 802 (1984); *U.S. Electrical Motors*, 261 NLRB 1343 (1982); *Phoenix Mechanical*, 303 NLRB 888 (1991); and *O'Brien Memorial*, 310 NLRB 943 (1993). See also *Duralam, Inc.*, 284 NLRB 1419 (1987).

In Lamar Advertising of Janesville, 340 NLRB 979, 980 (2003), the Board discussed the standard to be used when acts are committed by persons who are not union agents. This would include prounion employees as well as third parties. The Board stated:

In Westwood Horizons Hotel, supra, the Board set forth the following factors to be considered in assessing

<sup>&</sup>lt;sup>3</sup> Certain errors in the transcript are noted and corrected.

the seriousness of a third-party threat: (1) the nature of the threat itself; (2) whether the threat encompassed the entire bargaining unit; (3) whether reports of the threat were disseminated widely within the unit; (4) whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and (5) whether the threat was rejuvenated at or near the time of the election.

With respect to conduct by employees, there are therefore two questions. Are certain employees agents of the Union by virtue of their status and authorized behavior as members of the Union's employee organizing committee?<sup>4</sup> And if not agents, is their conduct, if proven by a preponderance of the evidence, sufficiently egregious to warrant concluding that the election should be set aside because their actions made a fair election impossible?

#### II. OBJECTIONS 2, 3 AND 5

#### The Translation Issue

In these objections, the Employer contends: (a) that the Regional Office of the NLRB erred by failing to translate the notice of election into traditional and simplified Chinese, (b) that notwithstanding the issuance of the notice in English and traditional Chinese, the Regional Office failed to have the ballots translated into traditional or simplified Chinese, and (c) that the notice of election that was translated into traditional Chinese contained errors. In the last respect, the Employer claimed at the opening of the hearing that the notice of election that was translated into traditional Chinese did not notify the employees (a) that the balloting would be secret and (b) that it described the unit incorrectly as being the employees of the casinos in Connecticut and not the employees of the Foxwoods Casino.

The NLRB Casehandling Manual (which, in part, only meant to provide guidance and not binding rules)<sup>5</sup> states at Section 11315.1:

The use of foreign languages may be required in Board elections. As detailed in Sec. 11315.2 notices of election, including side panels and/or center panels and/or ballots in languages other than English, may be provided in addition to English notices, where the need is shown in appropriate circumstances. . . . Because the preparation of foreign language notices may be extremely costly and may delay the election, the Regional Director should carefully evaluate request for such notices. In deciding whether to provide translated notices and/or ballots, the Regional Director

may consider the following factors: (a) the portion of the voting group which speaks a foreign language an does not read English, (b) the number of foreign language translations that would be required to accommodate these voters, (c) whether written communication between the employer and these employees is in English or their native language. (The mere fact that employees may communicate among themselves in a language other than English is insufficient to demonstrate that they do not understand written English.).

And at Section 11315.2, the Representation Casehandling Manual goes on to state:

The translated notices of election, (center panels as well as side panels), may be provided, as in paragraph (b) above, while English only ballots are provided to the voters at the election. In this case, the ballot appears on the notice of election, translated into the foreign language with the following notation above it. "The sample ballot reproduced in this notice appears in the [the foreign language] and is a translation of the ballot you will receive in the election. However the ballot you receive in the election will be printed in English."

In Superior Truss & Panel, Inc., 334 NLRB 916, 919 (2001), the Board adopted the hearing officer's report on objection in which he stated:

The Board has made it clear that it has no policy requiring the use of ballots in multiple languages. *Northwest Products, Inc.*, 226 NLRB 653 (1976); *Precise Castings*, 294 NLRB 1164 (1989), enfd. 915 F.2d 1160 (7th Cir. 1990), cert. denied 499 U.S. 959 (1991).

. . .

Pursuant to *Precise Castings*, supra, and the Casehandling Manual, there is no uniform policy mandating that every Region of the NLRB use foreign language ballots. To the contrary, the Board and the court held in *Precise Castings*, noting that Region 13 *never* uses bilingual ballots, that nothing in the Act prevents the Board from giving the Regions discretion in matters of this kind. *Precise Castings*, supra at 1164. Therefore, the Employer's argument addressing other Regions use of foreign language ballots is simply irrelevant. Region 13 is within its discretion to use English-only ballots, and this decision has been upheld by the Board and the courts.

The Seventh Circuit Court of Appeals has explicitly affirmed the Board holding that there is no obligation to print ballots in all of the languages that are used in the workplace. *NLRB v. Precise Castings, Inc.*, 915 F.2d 1160, 1161–1162 (7th Cir. 1990). The court, discussing its difference of opinion from an earlier Fifth Circuit case, stated:

Only a multilingual ballot assures the "laboratory conditions" necessary to effective choice, Precise Castings submits, with support from *Marriott In-Flight Services v. NLRB*, 417 F.2d 563 (5th Cir. 1969). Contra: *NLRB v. Lowell Corrugated Container Corp.*, 431 F.2d 1196 (1st Cir. 1970).

<sup>&</sup>lt;sup>4</sup> The organizing committee had 105 employees on it and these people were self-selected. Anyone who wanted to join could become a member. They solicited union authorization cards from other employees. They also helped distribute literature. On occasion, they gave interviews to the media after having their comments reviewed by union staff members. In addition, many were assigned to go in teams with union agents to visit employees' homes to solicit support. Of the 105 employees on the organizing committee there were 10 about whom there was some testimony. These were Peter Beck, Judy Colecchi, David Duval, William E. Lockwood, Dolly Puskas, Josef Chipman, Laureen DeMarchi, Mary Johnson, Donald MacPhee, and Billy Shea.

<sup>&</sup>lt;sup>5</sup> See Superior Industries, 289 NLRB 834 fn. 13 (1988).

The fifth circuit found two defects in the use of English ballots when a third of the voters were literate only in Spanish. First, the court believed, the election departed from the Board's policy of using bilingual ballots; second, the court thought that elections using ballots printed in a language employees cannot understand are unfair. . . . The first of these need not detain us. Since Marriott the Board has made it clear that it has no policy regarding the use of ballots in multiple languages. Northwest Products, Inc., 226 NLRB 653 (1976). The last vestige of that policy, if the Board ever had one (it denied having one at the time of Marriott, and Lowell concluded that it had none), was a statement in the General Counsel's practice manual that if a regional director deems election notices in multiple languages appropriate, the director also should print ballots in those languages. . . . The current version of the Manual . . . changes this to: "If a foreign language notice is used that language may also be used on the ballot."

Marriot's second and principal conclusion is that when many voters have "no access to ballots in a language [they] can understand [the election] necessarily falls below the minimum laboratory standards of fairness. . . . [I]t would be whimsical to establish meticulous safeguards against coercion, misinformation and corruption if a sizeable portion of the electorate, though untrammeled in its choice, does not know how to exercise it." 417 F.2d at 567 (footnotes omitted). When the fifth circuit wrote this in 1969, the Board required elections to take place in "laboratory conditions," free from the distortions common in political contests. . . . This doctrine was based in part on a belief that labor elections should be "better" than political ones, and in part on a belief that employees were easily misled and incapable of expressing their true choice except in "laboratory conditions." Since 1969 there has been a revolution in the Board's thought. Partly in response to research showing that employees were considerably more capable, and threats or propaganda less effective than the Board had believed . . . the Board overruled [Hollywood Ceramics Co., 140 NLRB 221 (1962)] . . . overruled General Knit of California, Inc., 239 NLRB 619 (1978). . . . Today the Board is much more likely than in 1969 to believe that employees can fend for themselves. It has pulled the rug out from under Marriott. The Board no longer establishes "meticulous safeguards" for elections, so it cannot be "whimsical" to assume that employees can cast accurate votes despite the fact that the ballot is in English. Questionable, perhaps; whimsical no.

. . .

Making labor elections more like political elections is among the Board's legitimate choices. And most ballots in political elections are in English. True, the voting Rights Act has, since an amendment in 1975 . . . required covered jurisdictions to offer ballots in languages used by 5% of the populace, if those groups are below the national norm in literacy. In the main, however, persons who do not speak English must learn from other sources how to cast an effective vote.

On the day of the election, Foxwoods employed in excess of 11,000 employees, of which approximately 2629 were eligible voters. Of this latter number, there were about 446 dealers with Chinese surnames who were born in mainland China, Hong Kong, or Taiwan and who spoke one or more of a number of Chinese dialects as their original language.<sup>6</sup>

Further, all of these people would have learned either traditional or simplified Chinese as their first written language. In this regard, although there are numerous spoken dialects in China (some of which are quite distinct from each other), there had been up until the 1950s only one utilized written language, which was called Mandarin Chinese. In the early 1950s, the Chinese government mandated the creation and thereafter the use of a simplified version of the traditional Chinese written language. This, essentially involved reducing the number of strokes found in some (but not all) of the characters used as words. Thus, after the 1950s, people who received their schooling in mainland China were taught simplified written Chinese and those who grew up in Hong Kong and Taiwan were taught traditional written Chinese.

Because the simplified version of Chinese was created and based on the original traditional version of written Mandarin Chinese, the two are closely related and from the testimony in this case, it seems that if one was taught one version, the other version can be learned fairly easily without instruction. These are not two separate written languages and from the testimony of the experts presented by the parties in this case, although there are about 60,000 characters in written Chinese, all but 3000 are shared by both versions of written Chinese. (For our purposes, there is no such thing as a written version of Cantonese.) For example, the Employer's Chinese language expert, made a translation of the ballot into traditional and simplified Chinese. Comparing the two versions, each of which had 143 characters, there were only 33 characters that were different, whereas all the rest were identical. And even among the differences, many in the simplified version were very similar to the characters that were written in traditional Chinese.

The Regional Director issued a Decision and Direction of Election on October 24, 2007.

On October 31, 2007, the Employer's counsel sent to the Regional Office a list of the names and addresses of the people in the bargaining unit who were employed as of the payroll period ending October 20, 2007. On the same date, Foxwoods sent a letter to the prospective voters, translated into a variety of languages, including Chinese, explaining that they were

<sup>&</sup>lt;sup>6</sup> Jt. Exh. 14 is a list containing the names of 446 dealers whom the parties agree were Chinese speakers. In addition, there are dealers who speak Spanish, Portuguese, Farsi, Vietnamese, Filipino, and Creole.

<sup>&</sup>lt;sup>7</sup> It appears that there have been, in the past, a few unsuccessful attempts to invent written versions of some of the Chinese dialects. But for all practical purposes, there has historically been only one widely used written language in China and that was a written version of Mandarin

<sup>8</sup> In written Chinese, each character represents a word. It is not like an alphabet or a system where each written character represents a syllable. Since each character in Chinese can represent a number of different words, two characters are often used together to make the meaning precise.

obligated to furnish the Regional Office a list of their names and addresses.

By letter dated November 1, 2007, the Employer's counsel suggested that the election be held in the Sunset Ballroom and that the languages to be used in the election be English, Spanish, Creole, Mandarin, and Cantonese. (As noted above, there is no such thing as written Cantonese.) On that same date, the Employer submitted, via e-mails, two examples of Foxwoods communications to employees that had been translated into Spanish, Creole, traditional Chinese, and simplified Chinese.

At some point after November 1, the Union's representative, Julie Kushner, was notified of the Employer's request for translations. She testified that she was aware that there was a fairly large population of Chinese dealers whose first language was Chinese. She informed the Region that she was neutral about having the notices and/or ballots translated into Chinese, but was concerned that if there were a lot of different languages used this might be more confusing to the voters. She further told the Board agent that she understood that in order to become a licensed dealer all employees had to understand English and that English was the only language allowed during work.

By letter dated November 13, the Regional Director notified the parties that the election would be held on November 24 in the Sunset Ballroom. He also stated:

With regard to the Employer's suggestion that the languages used in the election include Spanish, Creole, and Chinese, the Employer has proffered no evidence that any unit employees are unable to read or converse in English. Accordingly, the ballots will be in English only. However the notice of election will be printed in Chinese as well as English.

By letter dated November 14, 2007, the Region sent copies of the official notice of election. There was one version in English and one version in traditional Chinese. However, on the Chinese version of the notice of election the sample ballot contained in the middle panel was not translated and was still in English. With respect to the Chinese version of the official notice, the credited testimony is that the translation into Chinese made it very clear that this was to be a secret-ballot election and that the voting unit was to be the dealers who were employed by the Casino. (Singular and not plural.)

The Employer sent an e-mail to the Region on November 20, 2007, at 12:02 p.m. This stated inter alia:

The Nation has received the NLRB Notices sent by your office. In addition to the continuing objection, expressed repeatedly to you and the Regional Director, regarding the failure to provide notices in Mandarin and Canton Chinese and the failure to include the Chinese languages on the ballots themselves, the employer notes that the sample ballots list the labor organization only as "UAW."

In a second e-mail sent to the Region on November 20, 2007, at 1:31 p.m., the Employer's counsel stated:

One additional point just to make sure that the Nation's objections are clear. In addition to the objection to the objections to the languages on the actual ballots, the Nation continues to object to the sample ballot being in English only, especially on the Chinese Notice.

On November 21, 2007, the Regional Office responded to the Employer's November 20 e-mails as follows:

With regard to your reference to our alleged "failure to provide notices in Mandarin and Cantonese Chinese," I note initially that on November 14, 2007, both you and your client were sent Notices of Election in English and in Mandarin Chinese. With regard to your request for Notices in "Canton Chinese," as I previously informed you, it is my understanding that there is only one form of written Chinese, commonly referred to as Mandarin Chinese. Although there is a Cantonese dialect, a distinct written form of that dialect does not exist. In this regard, at no time have you ever advised the Regional office that this information was incorrect. With regard to the Region's decision not to include "Chinese languages" on the ballots . . . the Employer has proffered no evidence that any of the unit employees are unable to read or converse in English. In this regard, it is the Region's understanding, uncontradicted by the Employer that all of its dealers, including those of Chinese ancestry, operate gaming tables that are not restricted to Chinese speakers and are required to apply for Connecticut State Gaming Licenses which are only conducted in English."

Having received the English and Chinese election notices on November 14 or 15, neither the Employer nor the Union raised any issues regarding the accuracy of the Chinese translation at any time before the election. In this regard, I note that both parties had access and utilized Chinese translators during the period up through the election to convey their messages to the employees.

As scheduled, the election was held on November 24, 2007, with the official notices in English and traditional Chinese and with the ballots in English only. As shown above, the Employer never requested that either the ballots or the notice of election be in simplified Chinese and I can't assume that the Regional Director would even have been aware that there were two written versions of Mandarin Chinese at the time he made his decision. The Employer requested only that the Chinese languages used be Mandarin and Cantonese. The latter request could not be granted as there is no such thing as a written Cantonese language. Therefore, the Employer's postelection objection that the Regional Director's refusal to have the election notice and/or ballot translated into simplified Chinese can have no merit inasmuch as that was never requested.

As noted above, there were about 446 employees in the voting unit who likely were born in China, Taiwan, or Hong Kong (before it reverted to China). I am going to assume that because this hearing revolved around the Chinese language, that most of the foreign born dealers who work at Foxwoods are of Chinese background.

Until about December 2006, all communications between the Employer and its employees were in English. Then in or about December 2006, the Employer began to issue translations of some of its written communications in the languages of em-

<sup>&</sup>lt;sup>9</sup> It appears that the Regional Office did not provide any interpreters to assist voters at the polling place. However, there is no evidence that either party made a request that interpreters be made available.

ployees who emigrated from other countries. Janet Cummings, the Employer's vice president of communications, testified that the first translated document was issued in December 2006. Thereafter, the Employer has issued some written communications to its employees in a variety of languages including traditional and simplified Chinese. But this practice has not been uniform and a number of important documents have been issued without translation. These latter would include the employee handbook, a monthly bulletin (monthly matters), employment applications, instructional books, disciplinary notices, and licenses.<sup>10</sup>

Also, until about 2 years before this hearing, most applicants for dealer jobs had been trained at Foxwoods' own school. Although Foxwoods continues to operate this school, it has, in the past 2 years, interviewed and hired some applicants who go through outside approved schools of which there are two in New York City. As far as the current complement of Chinese dealers, I do not have sufficient information to tell me how many were trained at the Foxwoods school and how many were trained at the outside schools.

Assuming that a job applicant who applies directly to Foxwoods passes an aptitude test (given in English), and successfully passes a drug test and an interview, he or she would be enrolled in the Foxwoods training school where the initial course is for Blackjack. 11 This course takes about 8 weeks of 8-hour classes and is taught by Foxwoods employees only in English over a 3-month period. Moreover, the manual used by the instructor and the students for this course is printed only in English. During the course, there are weekly tests, a midterm test, and a comprehensive final exam consisting of about a 100 questions. These are written tests and are given only in English. Applicants are separated and efforts are made to prevent people from cheating. If an applicant doesn't understand a question, he or she can ask the instructor for clarification in English and any clarification will be given in English. If an applicant can't get a passing grade at the midterm or at the final, he or she is out. Obviously, if the applicant can't understand the questions that are written in English, that is too bad.

If the applicant passes the final test, he or she must then pass an audition where the applicant is tested in a mock game setting about all of the elements needed to do the job successfully. This is conducted only in English and the applicant must pass the audition in order to be hired. This audition takes about 3 to 4 hours and encompasses all of the materials set out in the Blackjack manual.

If an applicant takes the course at one of the outside schools in New York City, he or she is likely to have received instructions in Chinese. (Albeit I have no idea if the written materials used are in English or Chinese). Nevertheless, if the person comes from one of the New York City schools and has passed tests administered by these schools, he or she must still take the comprehensive English language audition at Foxwoods in order to get a job. In this regard, the Union presented the testimony of Xian Rong Sun, an applicant who had gone through a New York City school and who was denied employment because she could not adequately perform at the audition in English.

If a dealer is hired, he or she is given a set of documents to read and sign, all of them in English. One of the documents in the package is a statement that the information given by the applicant is true. On that document, there is a space for the applicant's signature and a place for the signature of an interpreter if one is used. In a summary prepared by the parties based on a variety of documents, of 446 Chinese names, 14 indicated that an interpreter had been used by the applicant. Although relevant, I don't place as much reliance on this as the counsel for the Regional Office would suggest.

The evidence establishes that all dealers are required to speak only in English while working at the gaming tables. This involves calling out the game as it progresses so that the floor supervisor knows what is happening. It also involves making small talk with customers so that they will feel at ease while playing the game. The only exception is where a customer can't understand English.

During the election campaign, both the Union and the Employer held meetings with employees and distributed literature urging employees to vote yes or no. The literature issued by both sides was typically translated into Chinese. (The Employer's literature was translated into traditional and simplified Chinese and at times either mailed to employees' homes or posted at the Casino.)

In addition, the Employer prepared two DVDs that were in English and other languages including Chinese. One of the DVDs issued by the Employer was shown at meetings with employees on its premises and had a group of people enacting the voting procedure. This included a description of the ballot and an explanation of what it means. This was done in a variety of different languages including Chinese. In this DVD, a narrator explained that putting an X in the "no" box meant that the voter did not want the UAW.

The other DVD was mailed to the employees' homes and contained a booklet translated into various languages including traditional and simplified Chinese. It contained sample ballots that were translated into both forms of written Chinese and had the "no" box marked with an X. It also contained the following quote:

Voting in the National Labor Relations Board election is easy. You simply;

- 1. Go to the Sunset Ballroom on Saturday, November 24, anytime between 8:00 a.m. and 11:00 p.m.
- 2. When you get to the voting area, give your name to the Labor Board agent.
  - 3. Take the paper ballot to the enclosed ballot booth.
- 4. Mark your ballot with an "X". Mark the "NO" box of you do not want the Union.

[Sample ballot inserted with the "No" box marked.]

The Employer pointed out that the Union, via written materials and through its website, provided Chinese translations of its campaign materials. Kusher testified that this was done, not so much because of necessity but because it showed respect to the prospective voters who came from other countries.

<sup>&</sup>lt;sup>11</sup> There are subsequent courses given in other games, each of which comes with its own manual of instructions. All of these are in English only.

5. Do not write your name on the ballot. Fold your ballot in half so no one sees it and place it in the ballot box.

The evidence showed that during the weeks before the election the Employer conducted meetings with the employees to discuss the election. In some cases, Chinese translators were present to answer questions. At other meetings that were held exclusively with Chinese employees, the person who spoke on behalf of the Employer was also a Chinese speaker. For example, Pauline Chao testified that she was one of several Chinese speaking people who conducted meetings with Chinese dealers. She testified that she held three or four such meetings where she explained the procedures of voting. She stated that she explained that she told employees that if you vote "yes" that means they would represent you and if you vote "no" that means the Union would not represent you.

In addition to the material distributed or made available by the Employer, the Union issued its materials in English and Chinese urging people to vote "Yes." Without going into detail, this material was distributed by hand, by mail, and via the Union's website.

The point here is not to show that either party, in terms of its campaign materials, did or said anything wrong. The point is to show that each side spent a lot of time, effort, and money to get its point of view across to the employees. As there was other testimony showing that the election was the principle topic of conversation among the employees during the week before the election, it is inconceivable to me that employees, unless they were unconscious or completely disinterested in the outcome, were unaware of the issues and were aware that marking a ballot with an X in the "yes" box meant that they wanted union representation and marking a ballot with an X in the "no" box meant that they were against the Union.

In support of this objection, the Employer presented 12 eligible voters who essentially claimed that they did not understand the English language ballot. This represents 2.6 percent of the Chinese dealers and there is no indication that this constitutes a random or representative sample. (Being excellent attorneys, I surmise that the Employer's counsel chose to present those witnesses and facts which they believed to be true and were most favorable to their client's position.)<sup>12</sup>

Mr. Yin Chen, who started working at Foxwoods in September 2007, answered most of the questions that were posed to him on direct and cross-examination in English. He testified that he reads traditional and simplified Chinese and also can read some English. On his employment application, he indicated that he can read, write, and speak English and Chinese. Chen acknowledged that before the election he understood that the English abbreviation on the ballot for UAW meant the Union, but testified that he didn't understand the words "collective bargaining." (I note in the latter regard that two non-Chinese, English speaking witnesses were asked if they knew what the words "collective bargaining" meant and both stated that they did not. *One of these was an Immigration lawyer*.)

Ms. Yin Chen, who had been employed for 4 months at Foxwoods at the time of the hearing, was born in China. She testified that she can read simple English and that sometimes when she receives memos in English she will ask the floor manager for help. She also testified that she had heard about the Union from other employees and the parties stipulated that she attended three preelection meetings held by the Employer. When she was hired she signed a confidentiality agreement that was written in English and she signed another English language document indicating that she had received and read the employee handbook. (The handbook is written in English only.). This witness testified that she saw English and Chinese election notices at the facility. She testified that she voted in the election.

Lin Shuzhen had been employed as a dealer at Foxwoods for 5 months at the time of the hearing. She was born in Fujian province and has been in the United States for 4 years. (She indicated that she studied English in a Chinese middle school). Shuzhen testified that she sometimes has trouble understanding English and doesn't read English. Although starting out with a translator, she answered many of the questions in English before the translator posed questions to her in Chinese. Like Ms. Yin Chen, she signed an English language confidentiality agreement and she signed an English language document indicating that she had received and read the employee handbook. On cross-examination, Shuzhen acknowledged that she knew that the election was for a union and that she knew how she wanted to vote. (She did in fact vote.) Shuzhen acknowledged that she saw election notices at the facility but states that she didn't pay attention to them. She further acknowledged that she received literature from the Union and the Employer at her home, but that she threw them away.

Ya Qiong Zeng has been employed by Foxwoods for 3 years. <sup>13</sup> She testified that she knows how to speak some English but has difficulty with written English. (She used the translator during the hearing more often than Lin Shuzhen and either Yin Chen.) Her employment application indicates that she

<sup>12</sup> Although relevant, I don't place much reliance on the more generalized testimony of the Employer's witnesses who asserted that some unidentified Chinese dealers have difficulty in communicating or reading English. For one thing, the testimony in this regard does not disclose who in particular these people are. For another, the testimony is somewhat contradictory or not particularly dispositive of whether the Chinese language dealers can read English. For example, Pauline Chou testified that perhaps 60–70 percent of the Chinese dealers needed help reading English. She based this estimate on her assertion that they often come to her to explain memos that are issued in English. But that doesn't prove that they don't read English. It can also mean that they simply want clarification from a Chinese speaking manager of any policy changes that may affect their work or employment. Glorimar Lopez testified that over the course of 10 years she could recall only one occasion where she had to use a translator to speak to someone whose native language was Chinese. Jimmy Matos testified that he speaks with a lot of Chinese dealers each week and although it is sometimes hard to communicate, he manages to do so in English. Betty Ann

Conroy, a floor supervisor called by the Union, testified that when she occasionally has trouble understanding a Chinese dealer she asks them to slow down and then it was fine

<sup>&</sup>lt;sup>13</sup> This would mean that she must have gone through the Foxwoods training school where the entry level Blackjack course is given in English only and where the job applicants are required to take and pass a series of English language tests.

speaks, reads, and writes in Chinese and English. Zeng testified that she voted in the election and that she knew how she intended to vote. She testified that she saw the election notices at the casino, but did not pay any attention to any of the literature mailed to her home by either the Employer or the Union. Zeng also acknowledged that she attended at least two meetings held by management, one of which had a Chinese translator present who showed and explained the ballot and how to vote.

Yue Jing Lin has been in the United States for 3 years and her primary languages are Cantonese and Mandarin. (She studied English for 1 year in China.) During her testimony, she answered almost all questions in English and there is no doubt that she is fluent in the English language. Lin acknowledged that she attended the Foxwoods training school where the instructions, materials, and tests were all in English. Lin also testified that when she went to vote, she knew that the vote was about a union.

Yan Ling, whose original language is Cantonese, has been in the United States for 8 years. He testified that he can read a little English but that if he receives an English language memorandum at work that he doesn't understand he will get help from others. During his testimony, he answered many of the questions without using a translator. Ling acknowledged that before the election, he attended a meeting with Pauline Chou who spoke to employees in Chinese and who, as noted above, explained the election process and how to mark the ballot.

Kio Pun was born in Hong Kong and has been in the United States since 1989. He has been employed at Foxwoods for 6 years and attended the Foxwoods training school. He testified that his primary language is Cantonese and that he "seldom" reads English. Pun testified that when his children sometimes ask him about their homework he will use the dictionary to help them understand English words. He testified that he is a U.S. citizen and it is noted that in order to gain citizenship, there is a requirement that except for some limited cases not applicable here, an applicant must demonstrate an ability to read simple English. In his employment application, Pun indicated that he could read and write in English and Chinese. Pun also testified that he took 2 years of English in college. He voted in the election

May Wong was born in Canton and came to the United States in 2000. She has been employed at Foxwoods for 8 years and presumably attended the Foxwoods training school where she was required to take the course in English and pass a battery of English language tests. Notwithstanding those facts, she testified that she doesn't speak much English and can't read English. Wong acknowledged that she attended a preelection meeting where the company explained the voting procedures but she asserts that she didn't pay attention. (The time records show that she attended three such meetings.) She also acknowledged that she received campaign materials at her home but didn't read them or look at the DVD that was mailed to her house. She acknowledged that before the election there was a

lot of talk about the Union and that she had made up her mind about how she was going to vote before she cast her ballot.

Ada Liang speaks Cantonese and has been in the United States for 10 years. She has been employed by Foxwoods for 8 years. She testified that she can read simple English and that if she gets company memos in English she asks someone to translate or uses a dictionary. Although somewhat evasive, Liang admitted that she attended one preelection company meeting held at the theatre and another smaller meeting where there was a person who spoke in Chinese.

Barry Shuen speaks Mandarin and claims that he can't read English. However, he has been in the United States for 17 years and has been working at Foxwoods for 11 years. He acknowledged that he was aware that UAW meant the Union and that there was a lot of talk about the Union before the election. He testified that about a week before the election, he was given a sample of the ballot and that he received campaign materials at his home, some of which were in Chinese. He voted in the election.

Qingfeng Chen was born in China and has been in the United States for 6 years. He testified that he can speak basic English and can read books that are written in simple English. At the hearing this witness seemed to need the translator a lot. The parties stipulated that he attended three company held preelection meetings and he acknowledged that the election procedure was explained to employees. He voted in the election.

Miao Chen's first language is Cantonese. She claims that she can read only a little bit of English. She has been in the United States for 14 years and is a naturalized U.S. citizen. Chen has been employed by Foxwoods for 8 years and presumably she went through the Foxwoods training school. On cross-examination, she acknowledged that she attended two company held preelection meetings, one of which was held by Pauline Chou who spoke in Chinese. She voted in the election.

This record contains no evidence to show that any Chinese language dealers failed to vote because the election notices were not translated into simplified Chinese or that the sample ballots contained in that notice was not translated into either version of written Chinese. I reject the Employer's contention that because the Regional Office didn't offer to put the voting list into evidence, I should conclude that a number of Chinese employees therefore did not vote. For one thing, there was nothing to prevent the Employer from asking the Region to see, or at least to present to me, the voting list for an in camera inspection. Moreover, even if a number of Chinese employees did not vote, there is no causal connection between the guess that this was the case and the conclusion that they did not vote because the sample ballot was not translated into Chinese or because the notice of election was translated only into traditional Chinese.15

<sup>&</sup>lt;sup>14</sup> The Union presented Susan Ryan, a non-Chinese speaking floor supervisor, who testified that she often spoke in English with Wong without any difficulty.

<sup>&</sup>lt;sup>15</sup> After the briefs were filed, counsel for the Regional Director offered to submit for an in camera inspection, the voting list, offering to prove that about 81.4 percent of the Chinese employees voted and that the overall voter participation rate was 83 percent. Because I don't believe that there is any basis for making a causal connection between the nonvoting of some Chinese dealers and the failure to translate the ballots into Chinese and/or the failure to translate the notice of election

Based on the totality of the evidence presented by the Employer and the Union, it is my opinion that the Employer has not established that any significant number of Chinese born unit employees had such difficulty with reading and understanding English that the failure to translate the ballot into Chinese could have affected the election. The employees presented by the Employer did not represent a random sampling of the Chinese voters. And the evidence failed to convince me that any more than a few, at most, might have had any difficulty in understanding how to mark their ballots. (In a few of the cases, any difficulty they might have had could be attributable to their indifference.) The notices of the election posted at the facility were in English and traditional Chinese. Both the Company and the Union communicated to the employees in English and Chinese by a wide variety of means. Additionally, the Company held a series of meetings urging employees to vote "no" and explaining the election procedure. In some cases, meetings were conducted in English with a Chinese translator available to answer questions. In other cases, meetings were held where instructions about the balloting were given by a Chinese speaker. This was bolstered by mailed DVDs and pamphlets explaining the balloting procedure in various languages including Chinese.

In short I conclude that Objections 2, 3, and 5 should be overruled.

## III. OBJECTION 6

In this objection, the Employer alleges that agents of the Union interfered with the election by making it known that it was keeping lists of the names and badge numbers of eligible voters and whether and how they voted.

There were five witnesses presented by the Employer who testified that on the day of the election (November 24) there were people in or around the restrooms outside the Sunset Ballroom who asked people if they voted and how they voted. These witnesses were Diane Weaver, Maija Hill Ninnant, Jimmy Matos, Jorge Ladino, Glorimar Lopez, and Juan Ampavo. Three of them, Diane Weaver, Juan Ampavo, and Maija Hill Ninnant testified that the person they saw, (respectively a woman and a man) had a pad of paper in his or her hand. Weaver thought the person that she saw was possibly a dealer who was Filipino.

One of these witnesses, Glorimar Lopez, testified that when she was asked how she intended to vote she replied that she was going to vote "no." Lopez states that this person told her that she had better vote "yes" because you're going to lose your job. According to Lopez, she asked the person who she was and this individual said that she was from the Union. Although giving a physical description of this woman, neither Lopez, nor any other witness in this case could proffer any identification for this person.

In a similar vein, Jimmy Matos testified that on the day of the election, he went to the employee cafeteria before he voted and that a young lady was asking people how they voted. Matos states that when she asked him how he voted, he said "no" and she replied that, "[Y]ou may just lose your job for voting no." According to Matos, he ignored her, got something to eat and then stopped off at the bathroom outside the Sunset Ballroom before going to vote. Matos could not identify the person who talked to him in the cafeteria and there is no evidence that she was an agent of the Union.

Maija Hill Hinnant also testified that on November 23, the day before the election, she was outside the poker area, when another employee named Del Chin had a notebook and appeared to be writing down the names and badge numbers of a group of dealers who were known to be against the Union.

There is no evidence that on the day of the election, any persons were actually makings lists of the people who were voting. Nor was there any evidence as to the identity of the people who allegedly spoke to Matos in the cafeteria or were in and around the rest rooms that were located outside the Sunset Ballroom. The fact is that the rest rooms in question are located in the public part of the property (as opposed to employee only areas), and employees are not even supposed to use them. Anyone could have been there during the time that the election was held. I note that this election had drawn the attention of the local media and it is certainly possible that these individuals could have been reporters who were conducting a kind of exit poll. <sup>16</sup>

There is no evidence to show that any agents of the Union kept lists during the election. Nor has it been shown that the alleged threat reported by Lopez was made by any person who had any relationship to the Union. As the conduct alleged cannot be considered "so aggravated as to create a general atmosphere of fear or reprisal rendering free choice in an election impossible," I therefore conclude that this objection has no merit and I recommend that it be overruled.

#### IV. OBJECTION 7

In this objection, the Employer alleges that the Union interfered with the election by making a speech to a massed assembly of employees within 24 hours before the scheduled time of the election.

Even assuming that this was the case, such conduct, by itself, would not be grounds for setting aside the election. In Peerless Plywood, 107 NLRB 427, 429 (1953), the Board held that employers and unions would be forbidden to make election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for an election. However, the *Peerless Plywood* rule was held inapplicable in the case of a casual solicitation of three employees, only one of whom was eligible to vote, the night before the election by a union agent. This, said the Board, cannot be characterized as a "speech" to a "massed assembly of employees." "That rule was not intended to, nor, in our opinion, does it prohibit every minor conversation between a few employees and a union agent or supervisor for a 24-hour period before an election." Business Aviation, Inc., 202 NLRB 1025 (1973). The Board has also held that the rule does not prohibit employers and unions from making campaign speeches on or off company premises

into simplified Chinese, I don't think that it is necessary to take up the offer.

<sup>&</sup>lt;sup>16</sup> Julie Kushner testified that she gave instructions to all of her staff to stay off the property during the election.

during the 24-hour period "if employee attendance is voluntary and on the employees' own time." *Peerless Plywood Co.*, supra at 430. See also *Nebraska Consolidated Mills*, 165 NLRB 639 (1967).

The only evidence of a massed speech to employees by the Union can only relate to a union meeting held at the Union's hall in Norwich, about a week before the election. As the Employer presented no evidence to show that the Union made a speech to a massed assembly of employees, either on or off the Company's premises, within 24 hours of the election, I recommend that this objection be overruled.

#### V. OBJECTIONS 8-12

The Employer asserts that agents of the Union: (a) engaged in a pattern of harassment, threats, and intimidation for the purpose of suppressing the turnout of those opposed to unionization; (b) threatened eligible voters that the Union would obtain the discharge of employees who did not vote for or support the Union; (c) harassed and ridiculed employees who expressed opposition to the Union; and (d) interfered with the election by other unspecified acts.

I have already dealt with the testimony of Jimmy Matos and Glorimar Lopez insofar as they testified regarding alleged statements made by unidentified persons to the effect that if they voted against the Union they could lose their jobs. In this regard, I note that the Board has held that threats of job loss or discharge made by union representatives are considered to be noncoercive since employees can reasonably evaluate such comments as being beyond the union's control, and are, at most, a prediction of action to be taken by the employer. Hollingsworth Management; Bonanza Aluminum Corp., 300 NLRB 584 (1990); Pacific Grain Products, 309 NLRB 690, 691 (1992); Janier Plastic Mold Corp., 186 NLRB 540 (1970); Duralam, Inc., 284 NLRB 1419 fn. 2 (1987). I also note in this regard, that the testimony of Matos indicates that he might have misunderstood the alleged statement. He testified that he understood the statement as meaning; "Your job is not safe unless we got a union in here; if a union is not in here, your job is not safe, they can fire you any time they want."

The Employer called Heidi Smith who testified that union representatives visited her home on five occasions during the week before the election. On the final visit, which occurred on Friday, Smith testified that her son answered the door and she could hear them ask her son how she was going to vote. According to Smith, she stepped into the doorway and told them that she was going to vote "no." She states that at this point, one of the people told her that her job was in danger if she voted "no" and she needed to vote "yes." Smith testified that she didn't let them identify themselves and she could not identify either person except to say that one was a man and the other a woman. She also testified that neither person explained how voting "no" would endanger her job and that she really didn't give them a chance to explain.<sup>17</sup>

Paul Tran, an employee whose first language is Vietnamese, testified in English that two people came to his house a couple of weeks before the election and asked him to sign a card. As far as I understand his testimony, these people told him that if he didn't want a union, he should not vote and that he replied that he was going to vote "no." Tran testified that they then said; "Well, if you vote no, you don't have right to work." Tran could not recognize either individual and testified that he never saw them before or since.

Michael Franck, an employee who actively campaigned against the Union, testified that around 3 days before the election he heard some of the dealers speculating amongst themselves how the Asian dealers were going to vote. He testified that one of the dealers named Theresa stated that they should tell the Asian dealers not to vote at all.

Cherie Shimard testified that despite asking union representatives not to come to her house, they nevertheless persisted in doing so. (Although she may object to union agents visiting her home, this, by itself, is not objectionable conduct that warrants setting aside an election.) She also testified about two incidents involving Dave Duval, who was on the organizing committee. In the first, she asserted that during a break Duval said that it would be hazardous to any dealer voting "no." In the second, Shimard testified that a day or two before the election she heard him say, as he was walking behind her, that those "f-ing dealers who are voting no need to watch their backs." Duval denied making these statements and, based on their respective testimony and demeanor, there is nothing that would lead me to conclude that either was more credible than the other. I note that Shimard indicates that the remarks made by Duval were made in the presence of other people but that no one was asked to corroborate her testimony.

Mellisa Flowers testified that she was told by an Asian friend that someone else had told her that if she didn't vote for the Union "they" were going to call immigration. Apart from the fact that this is double hearsay, we don't know who. Flower's friend is or who is alleged to have made the alleged threat to that friend. 18

Tina Denson testified about three alleged incidents involving another employee named Keith who was a union supporter. The most serious involves an alleged attempt by this person to interfere with the driving of her car. Nevertheless, as it was

<sup>&</sup>lt;sup>17</sup> One of the points that unions normally make during organizing campaigns is that without a union to assist them, employees, because they are hired on an at-will basis, may have little leverage in the event that they are discharged or disciplined by their employer.

<sup>&</sup>lt;sup>18</sup> Flowers also testified that about a month before the election, another dealer named Billy followed her while she was driving and that when she stopped, he drove up next to her and asked her to sign a card for the Union. This incident, assuming it happened, is not objectionable conduct but merely reflects an attempt by one employee to solicit union support from another. Flowers also testified that on another occasion she was visited at her home by Josef Chipman who tried to convince her to vote for the Union. She testified that she told him that she was going to vote "no" because she didn't want to pay union dues and that she agreed with her friend Tina Denson. According to Flowers, Chipman said that Denson was a liar, a troublemaker, and a f–ing bitch. At most, this amounts to mere name calling and does not qualify as a threat of reprisal warranting setting aside the election.

established that all three of the alleged incidents occurred before the petition was filed, they cannot be the basis for setting the election aside. *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961); *Gibralter Steel Corp.*, 323 NLRB 601 (1997); and *Dollar Rent-A-Car*, 314 NLRB 1089 fn. 4 (1994). (I also note that I rejected the Employer's offer to prove that certain post-election conduct should be considered as such conduct cannot be the basis for setting the election aside. *Mountaineer Bolt*, 300 NLRB 667 (1990). Also the alleged postelection conduct would not, in my opinion, make any difference in determining credibility as they involved verbal transactions between the same people who gave competing versions of events in the first place.)

Diane Weaver testified that on Wednesday, November 21, 2007, Donald McPhee tried to talk to her about the Union. She testified that as she approached the soda machine in the cafeteria a group of other employees surrounded her and started shouting at her to vote "yes." Weaver testified that one person, who she can't identify, told her that she was stupid for not voting for the Union. She also testified that another unidentified person threatened to drag her out of her house and beat her up. Weaver testified that during this entire incident there were other employees in the cafeteria who stopped to look.

Donald McPhee, who is on the organizing committee, testified about this incident and acknowledges that he tried to talk to Weaver about voting for the Union. He also acknowledges that a group of about three other employees came up to talk to her and that one said to her, "What are you, stupid." McPhee denied that either he or anyone else made any threats to harm Weaver or that they surrounded her in such a manner as to impede her ability to go to or leave the cafeteria. There were no other witnesses who corroborated either's version of events. And, in my opinion, there was nothing to say that Weaver's account of this transaction was any more credible than McPhee's.

The Employer called Angela Fernandes as a witness and she testified that on one occasion she was sitting on the employee shuttle bus when Mary Johnson (a member of the organizing committee) said that she knew where in Norwich Fernandes lived and that she too lived in Norwich. Assuming that the Employer had some point in providing this testimony, it escapes me. Nothing in this transaction can, in my opinion, be construed as being a threat or coercion.

Debra Beebe testified that she attended a union meeting at the Union's hall in Norwich, Connecticut, about a week before the election. Her testimony was that this was an upbeat meeting; that it was a rally type thing. She also testified that a union representative spoke to the employees and talked about a grievance procedure if employees had complaints at work. Beebe testified that during this discussion, the representative, Robert Madore, said that the Union would know who voted "no" and that they would have a way to have grievances filed by such persons pushed to the back so that their grievances would more than likely never be heard. The Employer offered no corroborating witnesses for this allegation.

The Union presented four witnesses, including Madore, who described this meeting and who all denied that the statement described by Beebe was made either by Madore or anyone else. In fact, they all testified that the subject of grievances was not even mentioned. Based on the totality of the evidence, I do not credit the testimony of Beebe.

The Employer called Faith Harper to testify about an incident that was not really referenced in the Employer's objections. This involved Harper's assertion that while she was on her way to a company meeting dealing with the election Billy Shea (a member of the organizing committee) came up to her, stated that he was aware that she was having difficulty with paying for some medication, and offered to pay it himself. In this regard, Shea testified that he had been friendly with Harper in the past and that she had confided in him about some of her family problems. He testified that when he heard about her difficulty in paying for her medication, he offered to pay for it for 1 month. According to Shea, he made the offer out of personal sympathy and not to influence her to vote for the Union. He testified and she essentially agrees that he did not even mention the Union during the conversation.

Harper also testified that on another occasion she attended a company meeting where she expressed her opinion that management should be allowed to express their views. She testified that shortly after the meeting she was confronted by Mary Johnson, a member of the organizing committee, who asked if she was "f—ing changing her god-damned mind" and that she was making a big mistake by doing so. (Johnson did not testify.) Obviously, this behavior was rude and uncalled for. However, this testimony does not objectively demonstrate that any threat was actually made to Harper.

To a large extent, the evidence presented by the Employer related to statements and conduct by unidentified people or unidentified employees. And, in the case of the alleged threat to cause deportations, this was based on unadorned hearsay allegedly heard by an unidentified friend who told the witness that she was told this by some other unidentified person.

On the other hand, some of the alleged conduct involved statements or actions by members of the organizing committee; these being employees who were particularly active in their support for the Union. Only one allegation directly involved the statements made by a union official and this involved the alleged, uncorroborated, and credibly denied statements regarding grievances that Robert Madore is alleged to have made at the meeting held in Norwich.

I note that as it is the Employer that is making the claims of misconduct it is the Employer that has the burden of proof. And, in this regard, it is my opinion that the Employer has not

<sup>&</sup>lt;sup>19</sup> As a general rule, the period during which the Board will consider conduct as objectionable—often called the "critical period"—is the period between the filing of the petition and the date of the election.

met that burden in this case. Certain of the Employer's witnesses testified about alleged threats of bodily harm or alleged actions that physically confined an employee. But, as I have concluded that there is no basis for crediting the Employer's witnesses over the Union's witnesses, I must find that these allegations lack merit. *National Telephone Directory Corp.*, 319 NLRB 420, 422 (1995).

Accordingly, I recommend that Objections 8-12 be over-ruled.

#### CONCLUSION OF LAW

Neither the Union nor the Regional Director has engaged in any objectionable conduct warranting setting aside the election.

# ORDER

The representation case should be remanded to the Regional Director of Region 34 for the purpose of issuing the appropriate certification. <sup>20</sup>

<sup>&</sup>lt;sup>20</sup> Under the provisions of Sec.102.69 of the Board's Rules and Regulations, Exceptions to this Report may be filed with the Board in Washington, D.C., within 14 days from the date of issuance of this Report and Recommendations. Exceptions must be received by the Board in Washington by March 25, 2008. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof upon the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board may adopt this recommended decision.